

FEDERAL COURT OF AUSTRALIA

Hlahla v Minister for Immigration and Multicultural Affairs [1999] FCA 667

MIGRATION – application for an order of review of a decision of the Immigration Review Tribunal – application seeks to review a finding of fact – application dismissed – no point of principle

Migration Act 1958 (Cth)

Matter No. S16 of 1999

OLIVER HLAHLA v MINISTER FOR IMMIGRATION AND MULTICULTURAL AFFAIRS

**VON DOUSSA J
14 MAY 1999
ADELAIDE**

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY**

S16 OF 1999

BETWEEN: **OLIVER HLAHLA**
 Applicant

AND: **MINISTER FOR IMMIGRATION AND MULTICULTURAL**
 AFFAIRS
 Respondent

JUDGE: **VON DOUSSA J**

DATE OF ORDER: **14 MAY 1999**

WHERE MADE: **ADELAIDE**

THE COURT ORDERS THAT:

1. Application be dismissed.
2. Applicant pay the respondent's costs.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

**IN THE FEDERAL COURT OF AUSTRALIA
SOUTH AUSTRALIA DISTRICT REGISTRY**

S16 OF 1999

BETWEEN: OLIVER HLAHLA
Applicant

AND: MINISTER FOR IMMIGRATION AND MULTICULTURAL
AFFAIRS
Respondent

JUDGE: VON DOUSSA J

DATE: 14 MAY 1999

PLACE: ADELAIDE

REASONS FOR JUDGMENT

- 1 This is an application for an order of review of a decision made on 28 January 1999 by the Immigration Review Tribunal (the Tribunal). The decision of the Tribunal affirmed an earlier decision of an officer of the Migration Internal Review Office not to grant the applicant a spouse visa sub-class 801.
- 2 The applicant is a citizen of Zimbabwe. He is now thirty-one years of age. He came to Australia in 1994 as a consequence of gaining a scholarship to study for a masters degree in chemical engineering at the Adelaide University. Initially he was in Australia on a sub-class 560 student visa. In Australia he met Ms Lisa Patterson and formed a relationship with her, and he married her on 3 December 1995 at Parkholme in the State of South Australia. On 30 January 1996 he applied for a spouse visa and was nominated for that visa by his wife. The application was a combined application for an extended eligibility temporary visa, sub-class 820, and a permanent visa sub-class 801. The sub-class 820 visa was granted to him on 10 May 1996.
- 3 It appears from the evidence that the marriage was a successful one for some eighteen months or so, but in the early part of 1997 problems began to manifest themselves. On 21 March 1997 the Immigration Department received a telephone call from Mrs Hlahla, advising that she and the applicant were proposing to separate. The Department instituted inquiries and

steps were then taken in relation to the outstanding application for the sub-class 801 visa, culminating in a decision by a delegate to refuse the grant of that visa on 1 July 1997.

4 There was an application for review of that decision by the Migration Internal Review Office. As I have recounted, that led to a decision adverse to the applicant. The matter then went to the Immigration Review Tribunal who conducted its hearing in December 1998.

5 The application to this Court is brought under s 475 of the *Migration Act 1958* (Cth) (the Act). The jurisdiction and powers of this Court are limited by the provisions of s 476 of the Act. An application for review is, in nature, an application for a judicial review, but it can only be considered on the restricted grounds enumerated in s 476(1).

6 Mr Hlahla has not been represented in these proceedings which, no doubt, has made them difficult for him. His case does not seek to address the grounds of review set out in s 476(1). Nevertheless, the case has been considered in detail by me and by lawyers for the respondent who have filed detailed submissions. The issue, identified by the written submissions filed by Mr Hlahla in the end raise concerns about a finding of fact made by the Tribunal, and do not identify any error of law, nor has one been identified by the submission of the respondent.

7 The relevant regulations relation to a sub-class 801 visa are part 801 and following. I refer expressly to 801.21 which says that there are no criteria that have to be satisfied at the time of the application for the visa, and 801.22 which sets out criteria that must be satisfied at the time of the decision. The relevant provisions of 801.22 for the purposes of the present application are 801.22, sub-part (2) and sub-part (6). Relevantly, they provide:

“(2) An applicant meets the requirements of this subclause if:

- (a) the applicant is the holder of a subclass 820 visa; and*
- (b) the applicant continues to be nominated for the grant of the subclass 801 visa by the nominating spouse; and*
- (c) the applicant is the spouse of the nominating spouse; and*
- (c) subject to subclauses (6A) and (7), at least 2 years have passed since the application was made.*

(6) An applicant meets the requirements of this subclause if:

- (a) the applicant is the holder of a subclass 820 visa; and*
- (b) the applicant would meet the requirements of subclause (2) except that the relationship between the applicant and the*

- nominating spouse has ceased; and*
- (c) *either or both of the following circumstances applies:*
- (i) *either or both of the following:*
- (A) *the applicant;*
- (B) *a dependent child of the nominating spouse or of the applicant or of both of them;*
- has suffered domestic violence committed by the nominating spouse;*
- (ii) *the applicant:*
- (A) *has custody or joint custody of, or access to; or*
- (B) *has a residence order or contact order made under the Family Law Act 1975 relating to;*
- at least 1 child in respect of whom the nominating spouse;*
- (C) *has been granted joint custody or access by a court; or*
- (D) *has a residence order or contract order made under the Family Law Act 1975; or*
- (E) *has an obligation under the Family Law Act 1975, or any other formal maintenance obligation.”*

8 It is clear from the reasons of the Tribunal that the application was decided adversely to the applicant under sub-part (2)(c), namely that he did not at the time of the decision meet the requirement that he was the spouse of the nominating spouse. To follow that reason it is necessary to refer also to regulation 1.15A which defines a spouse for the purposes of the regulations. Relevantly, sub-regulation (1) says that:

“For the purposes of these Regulations, a person is the spouse of another if the 2 persons are:

(a) in a married relationship as described in subregulation (1A)...”

9 Under sub-regulation (1A) persons are in a married relationship if there is a recognised valid marriage (which there was in this case), and the Minister is satisfied that the relationship between them is “genuine and continuing” and they “do not live separately and apart on a permanent basis”.

10 The Tribunal received evidence from the applicant and a witness that he asked to be called by the Tribunal, and also from the applicant’s wife who was subpoenaed by the Tribunal. The reasons of the Tribunal canvassed that evidence. At the conclusion of the reasons the Tribunal identified as the central issue for determination the issue of whether or not at the

material times the relationship can be said to have been a genuine and continuing one. That is an implied reference to the requirements of regulation 1.15A(1A). The Tribunal concluded that there was not a genuine and continuing relationship and that there was no prospect of reconciliation between the applicant and his wife. The matter was decided on that narrow ground.

11 In the application for an order of review and in the written submissions filed by the applicant, two grounds are advanced. The first is that the applicant qualified for the sub-class 801 visa under sub-part (6) and, secondly, that he also qualified under sub-part (2). Relevant to the ground alleged under sub-part (6), the applicant asserts that he suffered domestic violence committed by the nominating spouse, namely his wife. He says that on a social occasion when he and his wife were at a party, she kicked him in the backside, a fact that she admitted in the course of evidence before the Tribunal.

12 The Tribunal has not addressed the question of domestic violence and the possibility of eligibility for the sub-class 801 visa under sub-part (6). I have considered whether the failure to do so constituted an error of law that might be reviewable. In my view no such error of law occurred. The Tribunal did not address the question because it was not one that was either raised in a relevant way before the Tribunal or one which could be advanced, having regard to the provisions in the regulations relating to the definition of domestic violence and the means of proof.

13 The relevant provisions in the regulations are to be found in regulation 1.21 and following. Under regulation 1.23, a person is taken to have suffered domestic violence if the victim is a spouse and the victim presents evidence in accordance with regulation 1.24. Regulation 1.24 requires that there be a statutory declaration under regulation 1.25, which deals with statutory declarations by or on behalf of the alleged victim, together with two statutory declarations under regulation 1.26. The two statutory declarations required under regulation 1.26 must be declarations made by separate competent persons. "Competent persons" is an expression defined in regulation 1.21, and includes a medical practitioner, a registered psychologist, a registered nurse, or social worker, or a court counsellor under the *Family Law Act 1975* (Cth).

14 In the present case there was no attempt at any stage in the proceedings leading up to or at the hearing before the Tribunal to address any of those requirements. Moreover, the issue which

the applicant wished to agitate before the Tribunal was identified by him in correspondence sent to the Tribunal in support of the application which he filed on 2 July 1998 seeking a review. The correspondence comprised two letters. The first was a letter from the person who gave evidence on the applicant's behalf at the Tribunal. He gave reasons for his belief that the marriage relationship was a genuine one. The letter, however, does not address at all questions of whether it was a continuing relationship and omits any reference to the separation. But, more importantly, it was a letter addressed to the question of the marriage itself and did not advert to any issue of domestic violence.

- 15 The other letter was from the applicant himself, dated 17 June 1998, which canvassed matters of disagreement which had occurred in the course of the marriage which the applicant described as being like every marriage that has its ups and downs, but he said, the marriage was "now on the mend and continues to grow in strength with love, care and understanding", and that the relationship was "now a much happier one". He said:

"Our marriage is definitely much better and continues to be on the mend. My wife will shortly be forwarding to you a letter which shows her support for this appeal and the continuation and/or improvement of our relationship together."

- 16 That correspondence identified the issue of whether the marriage was a genuine and continuing one, and accordingly that was the issue that the Tribunal addressed. The matter before it was the applicant's assertion that he was, on the merits, entitled to the visa under sub-part (2). The matter was decided, as I have indicated, on the ground that one of the essential requirements for that visa was not met, namely that the applicant did not come within the definition of "spouse" because there was not a genuine and continuing relationship at the time of the decision.
- 17 The Tribunal did not address a further question which would have arisen had the applicant overcome the hurdle of there being a genuine and continuing relationship, namely whether for the purposes of sub-part (2)(b) the applicant continued to be nominated for the grant of the sub-class 801 visa by the nominating spouse. There is evidence that the nominating spouse had withdrawn the nomination on 23 April 1998 and, had that issue been addressed, it appears that there would have been another stumbling block for the applicant. However, it was not necessary for the Tribunal to address it because the application failed on the finding of no genuine and continuing relationship. In my view there was no error of law on the part

of the Tribunal by failing to address any issue that was raised before it.

18 In the course of the hearing today and in his written submissions the applicant asserts that the Tribunal was wrong in reaching the conclusion that there was not at the time of the decision a genuine and continuing relationship. He argues that the Tribunal did not fairly and objectively weigh the two sides of the evidence – his own on the one hand and his wife’s on the other – but, rather, accepted the wife’s evidence. That is a complaint that the Tribunal reached the wrong conclusion of fact. As I have already said, and as I endeavoured to explain to the applicant, both at a directions’ hearing and on the hearing of the application, this Court does not have jurisdiction under s 476 of the Act to embark upon a reconsideration of the merits of the factual findings.

19 There was plainly evidence before the Tribunal which justified the finding that was made by it, and no error of law is demonstrated in the way in which the Tribunal went about reaching that finding. The finding of fact being an open one, it is not one that this Court can interfere with. In the circumstances no error of law has been demonstrated, and the application for review must be dismissed.

20 There will be an order that the applicant pay the respondent’s costs.

I certify that the preceding twenty (20) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice von Doussa.

Associate:

Dated: 14 May 1999

Mr Hlahla appeared in person

Counsel for the Respondent: Ms S Maharaj

Solicitor for the Respondent: Australian Government Solicitor

Date of Hearing: 14 May 1999

Date of Judgment: 14 May 1999